

EPA RESPONSE TO JULY 12, 2013 LOWER WILLAMETTE GROUP'S NOTICE OF OBJECTION TO AND REQUEST FOR DISPUTE RESOLUTION OF EPA'S NOTICE OF DEMAND FOR PAYMENT OF STIPULATED PENALTIES REGARDING BASELINE HUMAN HEALTH RISK ASSESSMENT AND REQUEST FOR DETERMINATION

I. INTRODUCTION

On April 10, 2013, EPA notified the Lower Willamette Group (LWG) that it was assessing a \$125,500 stipulated penalty in accordance with Section XIX of the Administrative Settlement Agreement and Order on Consent (AOC) for the unacceptable second draft Baseline Human Health Risk Assessment (BHHRA). EPA's penalty notice followed three related actions: (1) a notice of noncompliance dated June 22, 2012 regarding the second draft of the BHHRA; (2) a final dispute decision issued on December 6, 2012 by Dan Opalski that upheld the noncompliance determination; and (3) EPA's April 3, 2013 approval of the final, revised BHHRA. The LWG is now disputing the assessment of the penalty related to the submittal of the unacceptable second draft BHHRA.

Section XIX, Paragraph 7 of the AOC provides:

“Respondents may dispute EPA's right to the stated amount of penalties by invoking the dispute resolution procedures under Section XVIII herein. Penalties may, at EPA's discretion, accrue, but need not be paid, during the dispute resolution period. If Respondents do not prevail upon resolution, all penalties shall be due to EPA within thirty (30) days of resolution of the dispute, unless otherwise agreed to by EPA. If Respondents prevails[sic] upon resolution, no penalties shall be paid.”

EPA has the “right” to assess a penalty in this matter because the second draft BHHRA submitted to EPA was unacceptable. The basis and merits of the noncompliance determination were extensively briefed and argued by both sides in the previous dispute resolution process. The Administrative Record Index from the previous dispute is attached to this Response as Exhibit 1 and the content of that administrative record is incorporated by reference into the record for this dispute. Mr. Opalski's final decision found a violation occurred, and no new information has been brought forward that warrants revisiting the December 2012 Opalski Decision. Therefore, the focus of this current dispute resolution process is EPA's decision to assess a stipulated penalty for the noncompliance and the stated amount assessed.

Stipulated penalties are used in CERCLA settlements as a tool for encouraging compliance by providing economic incentives to comply. See September 21, 1987 Memorandum, “Guidance on the Use of Stipulated Penalties in Hazardous Waste Consent Decrees,” attached as Exhibit 2 to this Response. Stipulated penalty provisions that state a fixed amount per day to be imposed

puts the Respondent on notice of the potential extent of his obligation before the violation occurs. CERCLA orders and decrees provide for escalating penalties as additional encouragement to comply. See Exhibit 2, pages 1-8. The RI/FS AOC for the Portland Harbor Superfund Site is consistent with the long-standing EPA guidance on the use of stipulated penalties.

Section XIX, Paragraph 1 of the AOC provides:

“Unless there is a Force Majeure event as defined in Section XX below, for each day that Respondents fail to complete a deliverable in a timely manner or fail to produce a deliverable of acceptable quality, or otherwise fail to perform in accordance with the requirements of this Order, Respondents shall be liable for stipulated penalties . . . Penalties begin to accrue on the day that performance is due or a violation occurs, and extend through the period of correction. Where a revised submission by Respondents is required, stipulated penalties shall continue to accrue until a satisfactory deliverable is produced. EPA will provide written notice for violations that are not based on timeliness; nevertheless, penalties shall accrue from the day a violation commences.”

The LWG failed to produce a second draft BHHRA of acceptable quality and did not perform in accordance with the requirements of the Order by not addressing all of EPA’s comments. The LWG members agreed to and were fully aware of the terms of the AOC, particularly of the stipulated penalty per day amounts and how and when penalties would accrue. They were represented by sophisticated legal counsel and the final AOC was the product of an “arms length” negotiation process. EPA’s decision to assess a stipulated penalty in the amount of \$125,500 is reasonable and fair in light of all the circumstances as discussed further below.

The Office Director should uphold the assessment of \$125,500 of stipulated penalties in this case because it is consistent with the terms of the AOC, and the application of the agency’s enforcement discretion in this matter was not arbitrary or capricious or otherwise inconsistent with law.

II. BASIS FOR ASSESSED PENALTY

The April 10, 2013 Penalty Assessment Letter (attached as Exhibit 3 to this Response) stated that penalties began to accrue with the June 22, 2012 notice and that they stopped accruing on February 11, 2013 when the LWG submitted an approvable BHHRA. The letter noted Section XIX, Paragraph 4 as the basis for the amounts being applied. The letter also clearly provided that the \$125,500 assessed penalty amount was based on 45 days of accrued penalties and not on the full accrual period. Below are the detailed mathematical calculations for the record.

The June 22, 2012 Notice of Noncompliance started accrual of penalties (June 23rd first day) at \$500 per day per violation, for the first seven days of noncompliance; \$1,000 per day, per violation, for the 8th through 14th day of noncompliance; \$2,500 per day, per violation, for the

15th day through the 30th day; and \$5,000 per day per violation for the 30th day through the 90th day. Penalties accrued until the date of correction, which was February 11, 2013, for a total of 233 days. The sum total was calculated as the daily rate of \$500 x 7 days (which equals \$3,500) plus the daily rate of \$1,000 x 7 days (which equals \$7,000) plus the daily rate of \$2,500 x 16 days (which equals \$40,000) plus the daily rate of \$5,000 x 203 days (\$1,015,000), \$1,065,500. EPA applied its discretion to waive 188 days (\$940,000) of the accrued penalty based on the LWG's good faith efforts to comply with the AOC.

EPA applied significant discretion in this case that favors the LWG. Under the AOC, EPA could have assessed penalties beginning on May 2, 2011, the date the unacceptable document was received by EPA. EPA could have also started penalties accruing on July 22, 2011, when EPA notified the LWG that the revised draft baseline human health risk assessment did not address all of EPA's comments and that EPA was going to modify the document, and requested the Word version of the document (See Tab 18 of the LWG dispute statement dated September 21, 2012). Instead, EPA did not begin accrual of penalties until it completed its modifications and comments and transmitted them on June 22, 2012. EPA considered all the relevant facts and circumstances surrounding the submittal of the inadequate second draft BHHRA and the good faith efforts by the LWG to come into compliance and decided to assess only a \$125,500 penalty rather than the full accrued amount of \$1,065,500. The assessed stipulated penalty represents accrued penalties from June 23 to August 6, 2012. EPA waived all of the penalties that accrued during the formal dispute process and the time it took the LWG to submit an acceptable BHHRA after the December 6, 2012 dispute decision, and EPA waived a majority of the penalties that accrued during the informal dispute process. EPA's approach to this enforcement action from the beginning has been to take all circumstances into account and apply our discretion in a fair and reasonable manner.

The LWG contends penalties are capped at 90 days pursuant to Paragraph 4 of Section XIX. Although the language in Paragraph 4 implies that penalties stop at 90 days, no other provision in Section XIX discusses a cap on how many days penalties could accrue. To the contrary, Section XIX is explicit and unqualified that penalties accrue as long as it takes until a late document is received or a satisfactory document is produced, and that penalties accrue throughout any dispute resolution process. Nonetheless, the Office Director need not decide in this case if there is a 90-day cap on stipulated penalties under the AOC, because the assessed penalty amount was for only 45 days of accrued penalties, not more than 90.

The assessed penalty complies with all the substantive and procedural requirements of the AOC and of law. The AOC explicitly provides that failure to produce a deliverable of acceptable quality, or otherwise fail to perform in accordance with the requirements of this Order is a violation for which stipulated penalties can be assessed. The AOC too is clear penalties accrue until a satisfactory document is provided, and accrue during the dispute resolution process.

An administrative order on consent, like a consent decree, is a hybrid in that it is both a contract and an order. United States v. ITT Continental Baking Co., 420 U.S. 223, 236 n.10 (1975); United States v. Chromalloy Am. Corp., 158 F.3d 345, at 349 (5th Cir. 1998) (A consent decree is akin to a contract yet also functions as an enforceable judicial order). When determining if a consent decree was violated the consent decree must be discerned within its four corners. US v. ITT Cont'l Baking Co., 420 U.S. at 237-38, and followed by Henderson v. Oregon, 203 Fed. Appx. 45 at 49; 2006 U.S. App. LEXIS 25253 (9th Cir. 2006) (A consent decree's reasonable specificity serves to give "fair notice" to a party of proscribed conduct to which it has agreed. This protects a party to a consent decree from obligations to which that party has not agreed.)

III. EPA'S ASSESSMENT OF STIPULATED PENALTIES WAS NOT ARBITRARY OR CAPRICIOUS AND WAS CONSISTENT WITH THE AOC AND LAW.

The LWG makes several arguments why EPA's assessed penalty should be withdrawn. All of their arguments would have the Office of Director reinterpret the language of the AOC. Some of their arguments in effect contest the validity of the AOC itself, which they agreed not to do when they signed it.¹

Below are the LWG's primary arguments for withdrawal of the penalty and EPA's responses:

1. EPA did not provide a detailed description of the basis for their noncompliance with its notice of noncompliance, thus, stipulated penalties should not accrue until it did.

The LWG contends that because it did not get the detailed list of comments that EPA claimed it did not address until July 27, 2012, they should not be subject to stipulated penalties for the period starting with the June 22 notice of noncompliance. They claim that had they known about the 17 comments "then the LWG could have addressed those issues expeditiously and cured the alleged noncompliance." LWG Notice, page 7.

However, the LWG does not understand that the penalty relates to the May 2011 submittal of an unacceptable second draft of the BHHRA and, since EPA modified the document, the unaddressed comments were no longer an issue. The AOC provides that stipulated penalties accrue each day that Respondents fail to produce a deliverable of acceptable quality, or otherwise fail to perform in accordance with the requirements of this Order. Where a revised submission by Respondents is required, stipulated penalties shall continue to accrue until a satisfactory deliverable is produced. The AOC requires EPA to provide "written notice for violations that are not based on timeliness," it does not say the notice must provide a detailed recitation of the full basis of why the document was not acceptable. EPA disagrees with the LWG's contention that the stipulated penalties could only accrue for four days, the date they received the detailed information regarding the 17 comments not adequately addressed until the

¹ "In any action by EPA or the United States to enforce this Consent Order, Respondents consent to and agree not to contest the authority or jurisdiction of EPA to issue or enforce this Consent Order, and agree not to contest the validity of this Order." Section II., Paragraph 2, AOC.

date they agreed to work from EPA's modified draft (July 27 through August 1). That contention is not supported by the terms of the AOC.

The LWG contends that if they were told on June 22, 2012 what 17 comments were not addressed, they would have remedied them and stopped penalties from accruing sooner. This is a post-hoc rationalization regarding what they may have done with more details. Nonetheless, EPA decided to modify the BHHRA in accordance with Section IX of the AOC, as of June 22, 2012, therefore; the comments were no longer an issue, and the only way to remedy the noncompliance was to correct the BHHRA consistent with EPA's modifications and last remaining comments. Additionally, given EPA's assessed penalty is for only 45 days out of 233 days, the LWG cannot show they were prejudiced by not receiving the detailed list of comments until July 27, 2012.

Furthermore, the actual events that occurred after the June 22, 2012 notice of noncompliance contradicts the LWG's representations that they were ready and willing to remedy the noncompliance upon receiving more details. In all of the communications and meetings that occurred between EPA and the LWG after the June 22, 2012 notice of noncompliance, the LWG insisted that nothing short of EPA's complete withdrawal of the notice of noncompliance would satisfy them and initially they did not want to even begin technical discussions on the modified BHHRA but rather start back with their deficient second draft. The LWG was given until July 24, 2012 to decide if they would proceed to finalize the BHHRA in accordance with EPA's modifications and comments, or if they wished to begin the dispute resolution process. No specific discussions about the modified BHHRA occurred until after July 24, 2012. They made the choice to proceed through the dispute process, and did not provide a list of technical issues with the modified BHHRA until August 15, 2013. After EPA sent its list of unaddressed comments on July 27, 2012, it was apparent to everyone that discussing the technical issues on the BHHRA would be more fruitful and potentially lead to a path forward to finalize the BHHRA. When all technical issues on the BHHRA could not be resolved and EPA did not withdraw the noncompliance determination, the LWG decided to seek a decision from the Office Director.

The LWG contends EPA did not comply with the June 30, 2011 Memorandum "Options for Responding to Deficient Deliverables from PRPs," Tab 9 to their Notice, because our June 2012 noncompliance notice did not specify the exact comments EPA contended were not addressed. EPA's enforcement decisions in this matter are consistent with EPA's Options guidance. EPA's Options guidance emphasizes that it is not possible to establish a uniform course of action that will apply in responding to every instance of a deficient deliverable and, in light of case-specific circumstances for the enforcement response, case teams may be more or less aggressive than options provided in the guidance. It also acknowledges that language of the specific enforcement document will determine enforcement options. Options Guidance, page 2.

Under the AOC, stipulated penalties accrue from the date of submission of an unacceptable document. The LWG was aware as far back as July 2011 that they had not addressed all of our comments on the first draft BHHRA and that we were modifying the document. Consistent with the AOC, EPA opted to modify the second draft BHHRA rather than provide the LWG a third opportunity to draft it. EPA exercised its discretion to not begin stipulated penalties accruing until we made the modifications and had our final comments on the second draft BHHRA because we did not know all of the modifications we would make nor all of our comments or how much time it would take. Thus, this enforcement approach is consistent with the AOC and EPA guidance.

2. Given the insignificant nature of the unaddressed comments and the lack of cognizable harm, the imposition of a stipulated penalty violates any standard of fairness and demonstrates a hyper-technical reading of the AOC given that the 12-year history of cooperation and compliance with the EPA for this site.

Mr. Opalski's final decision addressed the factual question of the significance of the unaddressed comments. Mr. Opalski found that 13 comments were not addressed and "taken as a whole, nearly all of the deficiencies pointed to a tendency in the original draft toward language that downplays risk or overemphasizes the conservativeness of the risk assessment . . . and affirm[ed] that the May 2, 2012, BHHRA failed to address EPA comments, and that this failure was sufficient to justify a finding of noncompliance with the Order on Consent." Opalski Decision, page 4. Later, EPA considered the total circumstances of the noncompliance in deciding to assess a \$125,500 penalty.

The LWG states "[n]o environmental harm, risk to public health, or delay in completion of the RI/FS resulted from the way the LWG addressed EPA's comments on the 2009 draft BHHRA." LWG Notice, page 2. Under the terms of the AOC, actual environmental harm is not required to assess stipulated penalties. Nonetheless, the deficient second draft BHHRA did cause harm, as there was delay in completion of the RI/FS. The second draft was submitted in May 2011 and was not corrected until February 2013, which was a delay of almost two years. The significant amount of time and resources EPA expended during that time to modify the BHHRA and have it finalized took time away from reviewing and finalizing the remainder of the RI and FS Reports.

Deficient deliverables and the delay that results to remedy those deficiencies is harm to the cleanup program and getting the cleanup accomplished. EPA has specifically identified and addressed that effect and harm on the cleanup program in its September 30, 1997 Memorandum, "Section 106(b)(1) Penalty Claims and Section 107(c)(3) Punitive Damages Claims for Noncompliance with Administrative Orders," attached as Exhibit 12 to LWG Notice. While that memorandum addresses violations of unilateral orders, it identifies that impact to the integrity of the CERCLA enforcement program is a type of harm for which penalties are appropriate, and provides that EPA may determine the level of harm "where noncompliance requires EPA to take over a response action, diverting Superfund resources from other cleanups" See Section

I.B.1.a., September 30, 1997 Memorandum. The “Options Memorandum” too confirms that deficient deliverables impede progress at CERCLA sites and is an enforcement issue that should be addressed. See Exhibit 9 of the LWG’s Notice.

The LWG contends that the \$125,500 penalty is “grossly disproportionate” when compared to imposition of other administrative penalties assessed by Region 10 in other cases. Presenting raw penalty numbers from other cases is irrelevant information in reviewing the case-specific facts and circumstances of this case. Particularly here because the LWG’s examples are statutory civil penalties, not stipulated penalties like this case where there was prior agreement on the per day amount of penalties that would accrue on specific deliverables and types of violations.

Additionally, although we did not research each of the listed penalties, we know a couple of the listed penalties involved Supplemental Environmental Projects (SEPs), which serve to reduce the amount of the penalty to be paid.² Likewise, there are many other statutory factors, such as financial ability to pay, mitigating circumstances, etc., that may influence a case-specific statutory civil penalty, which are not relevant to stipulated penalties.³

The LWG argues that a penalty should not be imposed because this is the first noncompliance issue and they have been working cooperatively for 12 years. Granted this may be the first stipulated penalty EPA has assessed under the LWG’s AOC, but it is not the first deficient deliverable, nor the first deliverable EPA has had to modify, nor the first time stipulated penalties have accrued for violations of the AOC. Attached as Exhibit 4 to this Response is a small sample of EPA correspondence over the past ten years indicating a lack of cooperation by the LWG: (1) July 25, 2003 letter conveying significant deficiencies with the draft RI/FS workplan and March 15, 2004 conditional approval of the RI/FS workplan if EPA previous directions for change were incorporated; (2) November 6, 2003 letter regarding the Round 2A field sampling plan about which EPA had to extensively modify it and direct the LWG use it; and (3) a series of letters and communications regarding the LWG’s failure to provide alternative screening information required by the AOC, starting with a December 21, 2010 letter indicating

² Ennis Paint involved not only a \$4,257 penalty but also a \$8,280 SEP. Similarly, the DOE/CH2M Hill case involved not only \$6,800 penalty but also a \$24,000 SEP.

³ The LWG self-selected a two and half year time period to look for Region 10 CERCLA AOC stipulated penalties and correctly points that no penalties were assessed under administrative orders on consent in that time period. However, CERCLA stipulated penalties were assessed under a consent decree during that time period and several under CERCLA AOCs or Federal Facility Agreements in the past 8 years. CERCLA stipulated penalties were assessed in 2012 regarding the St. Maries Superfund Site, and under a Federal Facility Agreement with the U.S. Navy at the Jackson Park Superfund Site in 2009, in the amounts of \$15,000 and \$45,000, respectively. In 2007, DOE paid a \$285,000 stipulated penalty under the Tri-Party Agreement at Hanford for failure to comply with CERCLA requirements and agreed to perform 2 SEPs costing \$855,000. EPA assessed a \$32,750 stipulated penalty in 2006 under a removal AOC against NW Natural at Portland Harbor and another penalty against the U.S. Navy in 2005 at Jackson Park in the amount of \$40,000.

noncompliance with the AOC, a February 25, 2011 letter that notifying the LWG penalties were accruing, and two emails dated June 6 and 9, 2011 noting that EPA was waiving imposition of penalties in the matter. EPA's decision not to take an enforcement action for previous violations of the AOC cannot be the basis for withdrawing the assessed penalty.

The amount of the assessed penalty is based on the per day penalty rates contained in the AOC, which reflects the high deterrent value placed on failure to produce an acceptable human health risk assessment. The human health risk assessment is one of the most significant documents in the CERCLA remedy decision-making process. Under the AOC, the highest level of stipulated penalties apply to the risk assessments (both human health and ecological). Nonetheless, EPA carefully considered the total circumstances surrounding the noncompliance in this case and the good faith efforts the LWG undertook to finalize the BHHRA. In applying our enforcement discretion, we waived the accrued penalties for all but 45 days, which meant waiving penalties that accrued during most of the informal dispute period and the entire formal dispute period. The assessed penalty is not arbitrary or capricious or inconsistent with the AOC or law.

3. No penalties should be assessed because 12 out of 13 comments that Mr. Opalski determined they did not address were non-directed comments and it violates the LWG's due process rights by imposing penalties for non-directed comments.

The issue of "directed" versus "non-directed" comments was a significant issue in the prior dispute, see pages 2 and 3 of the Opalski decision, attached as Tab 6 of the LWG Notice. Mr. Opalski decided that "to the extent a non-directed comment clearly communicates a need for a modification and provides sufficient clarity on what that modification needs to address I find that Respondents' treatment of both directed and non-directed comments can provide the basis for an EPA determination of Respondents' noncompliance with the Order on Consent." Page 3. He found the LWG did not address 12 non-directed comments that met his "sufficient clarity" test and one clearly directed comment. The test Mr. Opalski applied is consistent with principles of fair notice and due process. His decision was not otherwise arbitrary or capricious, and was consistent with the terms of the AOC.

The LWG contends that "[b]ased on more than a decade of communication with EPA's project manager, the LWG understood that 'directed comments' were the changes that EPA mandated." LWG Notice, page 15. But actually, the record shows the LWG was told otherwise (See EPA's Response to LWG's September 2012 Dispute, page 2 and footnote 5, Exhibit 2 to LWG's Notice) and Mr. Opalski did not find there was a basis to distinguish non-directed comments from directed comments. Whether we were mandating a specific change through a directed comment or commenting on an issue that required modification is mere semantics that has no legal significance under the AOC.

The AOC is clear regarding what the LWG's commitments and obligations under the AOC were. They were represented by sophisticated counsel and had due notice of the contract into which

they were entering. The assessed stipulated penalty does not violate the LWG's due process rights.

IV. SUMMARY

The LWG wants the Office Director to reconsider EPA's decision to assess a stipulated penalty for the deficient second draft BHHRA. They want the penalty withdrawn. They are not asking for a reduction but a full retraction. They want the Office Director to agree either there was no violation at all or, if there was a violation, it was so insignificant no penalty is warranted. They assert if we assess a penalty it will be a disincentive for parties to sign up to future CERCLA settlements.

The record shows that EPA applied its enforcement discretion in this case in a very thoughtful and intentional manner to be fair and reasonable in light of all the circumstances. The \$125,500 penalty is a reasonable amount for a deficient second draft BHHRA and strikes the right balance of seeking to deter future noncompliance with upcoming deliverables while taking into account all the circumstances and the LWG's good faith efforts to comply. We did not assess penalties from the date of the submittal of the inadequate second draft BHHRA which EPA could do under the AOC. EPA only assessed penalties from the date on which it provided the LWG the modified BHHRA and final comments. After the BHHRA was corrected and approved, in deciding whether to assess a penalty and for what amount, EPA thoughtfully considered the importance of the BHHRA to the remedy decision-making process along with the good faith attempts by the LWG to come into compliance and waived all but 45 days of accrued stipulated penalties. Stipulated penalties are a standard enforcement provision in all of EPA's CERCLA settlements. Nothing about this case indicates that EPA unreasonably applied its enforcement discretion. We request the Office Director to uphold the assessment of the \$125,500 stipulated penalty.

V. List of Exhibits

Exhibit 1: December 2012 Administrative Record Index

Exhibit 2: September 21, 1987 Memorandum, "Guidance on the Use of Stipulated Penalties in Hazardous Waste Consent Decrees"

Exhibit 3: April 10, 2013 Penalty Assessment Letter

Exhibit 4: Sample EPA correspondence regarding noncompliance with the AOC